

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE TEZOS SECURITIES LITIGATION

Case No. 17-cv-06779-RS

This document relates to:  
  
ALL ACTIONS

**ORDER DENYING MOTION FOR  
RELIEF FROM NONDISPOSITIVE  
PRETRIAL ORDER OF MAGISTRATE  
JUDGE**

Plaintiffs seek review of the assigned magistrate judge’s order denying Plaintiffs’ motion to compel certain communications withheld under the marital communications privilege and denying Plaintiffs’ administrative motion for leave to file a response to Defendants’ declarations in support of their privilege designations. A district court may modify a magistrate judge’s ruling on a nondispositive matter only if the order is “clearly erroneous” or “contrary to law.” 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). Because Plaintiffs have shown no such error here, the motion for relief is denied.

The magistrate judge carefully analyzed the facts surrounding the communications at issue and concluded that, although the disputed communications between spouses took place over work email addresses, the spousal communications privilege nonetheless applied. Because Defendant Kathleen Breitman (“Kathleen”) and Defendant Arthur Breitman (“Arthur”) are the sole officers and employees of Defendant Dynamic Ledger Solutions, Inc and because their communications were therefore not “likely to be overheard by . . . third parties,” *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990), the magistrate judge reasoned that the communications were indeed

1 confidential for purposes of the privilege. Furthermore, despite a Chief Security Officer gaining  
 2 administrator access to these communications, Arthur’s declaration noted the existence of an  
 3 agreement whereby this officer agreed not to access either Kathleen’s or Arthur’s emails. As  
 4 noted in the challenged order, the standard is not whether it is *possible* that a third party might  
 5 “overhear” the communications, but rather whether it is *likely*. *Marashi*, 913 F.2d at 730.  
 6 Plaintiffs’ reference to case law disavowing an employee’s “reasonable expectation of privacy” in  
 7 communications made on a work computer generally has little bearing on the unique situation  
 8 here—namely where the husband and wife were the sole officers and employees. In short, the  
 9 magistrate judge’s conclusion that the privilege applies was neither “clearly erroneous” nor  
 10 “contrary to law.” Fed. R. Civ. P. 72(a).

11 Nor are Plaintiffs entitled to relief based on the magistrate judge’s decision not to apply the  
 12 “business affairs” exception to the marital communications privilege. As noted in the challenged  
 13 order, there is no controlling law applying this exception within the Ninth Circuit. While  
 14 Plaintiffs are correct that the marital communications privilege is to be narrowly construed, *United*  
 15 *States v. Vo*, 413 F.3d 1010, 1016 (9th Cir. 2005), it does not follow that the magistrate judge  
 16 should have embraced an exception from cases outside the Ninth Circuit, particularly cases  
 17 interpreting a *different* spousal privilege. *See, e.g., G-Fours, Inc. v. Miele*, 496 F.2d 809, 811-13  
 18 (2d Cir. 1974) (applying “business affairs” exception to marital communications privilege under  
 19 New York state law). The decision not to import this carve-out and apply it to the unique facts of  
 20 this husband-and-wife business operation was neither clearly erroneous nor contrary to law.

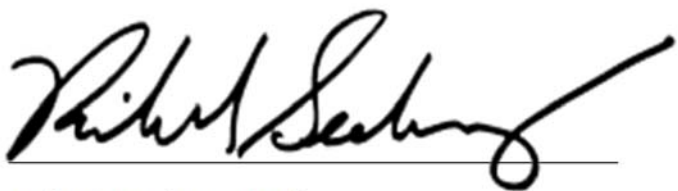
21 Lastly, the magistrate judge likewise did not commit clear error by denying Plaintiffs the  
 22 opportunity to respond to the declarations from Kathleen and Arthur in a separate filing. Plaintiffs  
 23 had an adequate opportunity to challenge Defendants’ assertion of privilege in their joint letter  
 24 brief, where Plaintiffs were allotted over four pages of argument. The Federal Rules do not  
 25 guarantee an opportunity to respond to each and every declaration filed by the opposing party.  
 26 Still, the magistrate judge was generally aware that Plaintiffs took issue with allegedly conclusory  
 27 and self-serving statements within the declarations through Plaintiffs’ administrative motion, and  
 28

1 it was not contrary to law for her to rule on the discovery dispute without first affording Plaintiffs  
2 another five pages to articulate these grievances with the declarations in greater detail.

3 Because the magistrate judge's rulings on the motion to compel and the administrative  
4 motion for leave to file a response were not clearly erroneous, Plaintiffs' motion for relief is  
5 denied.

6  
7 **IT IS SO ORDERED.**

8  
9 Dated: August 27, 2019



11 RICHARD SEEBORG

12 United States District Judge

United States District Court  
Northern District of California